


**MEMORANDUM**

TO: Management and Fiscal Policy Committee

FROM:  Michael Faden, Senior Legislative Attorney  
Glenn Orlin, Deputy Council Staff Director

SUBJECT: **Worksession:** Expedited Bill 19-10, Taxes – Transportation Impact Tax - Amendments

Expedited Bill 19-10, Taxes – Transportation Impact Tax - Amendments, sponsored by the Council President at the request of the County Executive, was introduced on April 20, 2010. A public hearing was held on May 11 (see testimony, ©15-46)

Bill 19-10 would revise certain aspects of the credits which apply to the transportation impact tax and codify in the law the transportation mitigation payment referred to in the County Growth Policy (soon to be the Subdivision Staging Policy). Its most controversial provisions are those that would phase out existing impact tax credits (see ©5, lines 91-95; ©7, lines 148-152).

**Issues**

**1) Should impact tax credits expire?**

Impact tax credits are intended to cover the cost of capacity-adding transportation improvements, of the kinds listed in County Code §52-58 (not amended by this Bill) that impact taxes would otherwise pay for, which are provided by a developer instead of the County. In 2003 the Council amended the transportation impact tax law to limit the life of any new impact tax credit to 6 years after the County Department of Transportation (DOT) certifies the credit. This provision was not highly controversial when it was enacted in 2003, partly because it was a late Committee addition to a comprehensive set of impact tax amendments and partly because it took effect prospectively and did not apply to credits earned before March 1, 2004.

As introduced, Bill 19-10 would apply the same 6-year expiration date to existing credits (see ©5, lines 91-95; ©7, lines 148-152). Not surprisingly, representatives of landowners and developers who hold impact tax credits cried foul (see testimony of Maryland-National Capital Building Industry Association (BIA), ©17-22; Kominers, ©30-39; Miller and Smith, ©23-24; Minkoff testimony, ©25-26; Robins testimony, ©27-29; O'Neil testimony, ©40-42). Neither the

Executive's introduction memo (see ©13), nor the County DOT testimony (see ©15-16), offered a particularly clear rationale for phasing out these credits. The Planning staff, in its memo to the Planning Board (see ©43-46), implicitly disagreed with the proposed phase-out, instead recommending that the credit recipient be allowed to seek an extension (presumably to be granted on request). The Planning Board did not send its official position in time to be printed in this packet.

In Council staff's view, the credit-holders hold the equitable high ground; they or their predecessors have actually built a road (or provided another tangible transportation improvement) which began to benefit County residents before (in some cases, long before) the development for which they will pay impact taxes receives its building permits. The County has no active liability for these credits; they will simply reduce the impact tax paid when the credit-holder eventually builds its development. Since the timing and amount of impact taxes received are somewhat speculative, even in the best of times, the County cannot reasonably depend on reliable estimates of credits to be paid in its capital budgeting. For these reasons, while Council staff would not repeal the prospective limit on credit life that took effect in 2004, neither would we extend that limit to previously-existing credits. This conclusion is particularly strong for the pre-2002 participation agreement credits allowed under §52-55(a) (see ©4-5, lines 75-90), which were not limited by the 2003 law.

**Options** With respect to the proposed phase-out of existing impact tax credits, this Committee could:

- 1) Apply the 6-year limit to all existing credits, as the Executive proposed.
- 2) Apply the 6-year limit to credits allowed under §52-55(b), the most-used category, but not to the pre-2002 agreement credits, which may have a more solid contractual basis.
- 3) Adopt a longer credit life limit, say 12 years, for the pre-2004 credits to recognize the longer time needed to complete many developments.
- 4) Adopt a 2-part limit for the pre-2004 credits: a certain number of years (say 6 or 12) or the life of the underlying development's adequate public facilities validity period, whichever is longer.
- 5) Adopt a specific limit (say 6 or 12 years) for the pre-2004 credits, but allow the credit-holder to seek an extension for up to the same limit.
- 6) Do not apply any limit to pre-2004 credits.
- 7) Do not apply any limit to any credits (repeal the 6-year limit on post-2004 credits).

**Council staff recommendation:** Option 6 (no limit on pre-2004 credits). If a limit is necessary, option 4, using 6 years.

## **2) Should impact tax credits be used to pay for other transportation obligations?**

Attorney Patrick O'Neil, representing Multi-Employer Property Trust (see testimony, ©40-42), proposed that impact tax credit holders be allowed to use excess credits to make mitigation payments under PAMR or "satisfy transportation obligations, as broadly defined".

For a few years, the County impact tax law gave credit holders a limited right to transfer excess credits to another development in the same area if the credit holder owned at least 30% of the receiving development. This offered a way to, in effect, buy and sell impact tax credits. The Council repealed this authority in 2003 out of concern that creating a market in impact tax credits could have undesirable consequences.

**Council staff recommendation:** do not allow impact tax credits to be used for other purposes.

**3) Minor issues** In response to various parties' testimony, **Council staff recommends** that:

- On ©7, line 155, 90 days be changed to 180 days, but after the improvement is completed be retained, rather than adding or the bond is released.
- On ©7, delete the sentence contained on lines 156-157.
- On ©9, line 204, insert before the period: unless the owner has already filed a bond in at least that amount with the County for the same improvement
- On ©9, lines 214-215, replace that is local or internal to with primarily serves residents or occupants of only one.
- On ©10, line 219, insert before the period: , except a credit issued under subsection (a).
- On ©10, line 231, replace \$11,000 with \$11,300.

Council staff will also make non-substantive technical and conforming changes to various parts of the Bill before it is scheduled for Council action. We will review those changes with DOT staff and other stakeholders.

This packet contains:

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F:\LAW\BILLS\1019 Transportation Impact Tax - Exec Amends\MFP Memo.Doc

Expedited Bill No. 19-10  
Concerning: Taxes – Transportation  
Impact Tax - Amendments  
Revised: 4-16-10 Draft No. 4  
Introduced: April 20, 2010  
Expires: October 20, 2011  
Enacted: \_\_\_\_\_  
Executive: \_\_\_\_\_  
Effective: \_\_\_\_\_  
Sunset Date: None  
Ch. \_\_\_\_\_, Laws of Mont. Co. \_\_\_\_\_

## COUNTY COUNCIL FOR MONTGOMERY COUNTY, MARYLAND

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By: Council President at the Request of the County Executive

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**AN EXPEDITED ACT to:**

- (1) modify the credits which apply to the transportation impact tax;
- (2) codify, and specify the terms of, the transportation mitigation payment referred to in the County Growth Policy; and
- (3) generally amend County law regarding impact taxes.

By amending

Montgomery County Code  
Chapter 52, Taxation  
Sections 52-47, 52-54, 52-55, and 52-59

<b>Boldface</b>	<i>Heading or defined term.</i>
<u>Underlining</u>	<i>Added to existing law by original bill.</i>
[Single boldface brackets]	<i>Deleted from existing law by original bill.</i>
<u>Double underlining</u>	<i>Added by amendment.</i>
[[Double boldface brackets]]	<i>Deleted from existing law or the bill by amendment.</i>
* * *	<i>Existing law unaffected by bill.</i>

*The County Council for Montgomery County, Maryland approves the following Act:*

**Sec. 1. Sections 52-47, 52-54, 52-55, and 52-59 are amended as follows:**

**52-47. Definitions.**

In this Article the following terms have the following meanings

Additional capacity means a new road, widening an existing road, adding an additional lane or turn lane to an existing road, or another transportation improvement that:

(1) increases the maximum theoretical volume of traffic that a road or intersection can absorb; and

(2) is designated as arterial or higher classification in the County's Master Plan of Highways, or is similarly designated or classified by a municipality.

Additional capacity is sometimes referred to as "highway capacity," "transportation capacity," or "intersection capacity".

\* \* \*

Major Activity Center is a commercial site, school, shopping area, transit area, Metro station, or other major employment area that generates pedestrian trips.

\* \* \*

Operating Expense includes reasonable costs of staffing, advertising, marketing, building rental, furniture, supplies and materials, bus fuel, and personnel to operate a trip reduction program.

\* \* \*

Sidewalk Connector means a sidewalk that provides a direct link or connection to a major activity center.

Social service provider[:] means a locally-based, federally tax-exempt nonprofit direct provider of social services whose primary service area is Montgomery County.

**52-54. Refunds.**

- 29 (a) Any person who has paid a development impact tax may apply for a  
30 refund of the impact tax if:
- 31 (1) the County has not appropriated the funds for impact  
32 transportation improvements of the types listed in Section 52-  
33 58, or otherwise formally designated a specific improvement of  
34 a type listed in Section 52-58 to receive funds, by the end of the  
35 sixth fiscal year after the tax is collected;
- 36 (2) the building permit has been revoked or has lapsed because  
37 construction did not start; or
- 38 (3) the project has been physically altered, resulting in a decrease  
39 in the amount of impact tax due.
- 40 (b) Only the current owner of property may petition for a refund of the  
41 impact tax. A petition for refund of the impact tax must be filed  
42 within the time established for filing a claim for refund of a local tax  
43 under state law.
- 44 (c) The petition for refund of the impact tax must be submitted to the  
45 Director of Permitting Services on a form provided by the County.  
46 The petition must contain at least:
- 47 (1) a statement that petitioner is the current owner of the property;  
48 (2) a copy of the dated receipt for payment of the development  
49 impact tax issued by the Department of Permitting Services;  
50 (3) a certified copy of the latest recorded deed for the subject  
51 property; and
- 52 (4) the reasons why a refund of the impact tax is sought.
- 53 (d) The Director of Permitting Services must investigate each claim and  
54 hold a hearing [at the request of] if the petitioner requests a hearing.  
55 Within 3 months after receiving a petition for refund of the impact

tax, the Director of Permitting Services must provide the petitioner, in writing, with a decision on the impact tax refund request. The decision must include the reasons for the [decisions] decision, including, as appropriate, a determination of whether impact tax funds collected from the petitioner, calculated on a first-in-first-out basis, have been appropriated or otherwise formally designated for impact transportation improvements of the types listed in Section 52-58 within [six] 6 fiscal years. If a refund of the impact tax is due the petitioner, the Director of Permitting Services must notify the Department of Finance and, if the property is located in Gaithersburg or Rockville, the finance director of that city.

(e) The Department of Finance must not pay a refund of the impact tax unless the petitioner has paid all other state, county, or municipal taxes, fees, or charges that the Department is responsible for collecting.

(f) The petitioner may appeal the determination of the Director of Permitting Services in accordance with Article 24, Title 9, of the Maryland Code or any successor law.

#### **52-55. Credits.**

(a) (1) A property owner is entitled to a credit if the owner, before July 1, 2002, entered into a participation agreement, or a similar agreement with the state or a municipality, the purpose of which was to provide additional transportation capacity. A property owner is also entitled to a credit if the owner receives approval before July 1, 2002, of a subdivision plan, development plan, or similar development approval by the County or a municipality that requires the owner to build or

83 contribute to a transportation improvement that provides  
 84 additional transportation capacity. The Department of  
 85 Transportation must calculate the credit. The credit must equal  
 86 the amount of any charge paid under the participation  
 87 agreement. The Department may give credit only for building  
 88 permit applications for development on the site covered by the  
 89 participation agreement. [The Department must not give a  
 90 refund for a credit earned under this subsection.]

91 (2) Any credit that was certified under this subsection before  
 92 February 1, 2010, expires on February 1, 2016.

93 (3) Any credit that is certified under this subsection after February  
 94 1, 2010, expires 6 years after the Department of Transportation  
 95 certifies the credit.

96 (b) A property owner must receive a credit for constructing or  
 97 contributing to an improvement of the type listed in Section 52-58 if  
 98 the improvement reduces traffic demand or provides additional  
 99 transportation capacity. However, the Department must not certify a  
 100 credit for any improvement to or other action limited to a State road,  
 101 except a transit or trip reduction program that operates on or relieves  
 102 traffic on a State road or an improvement to a State road that is  
 103 included in a memorandum of understanding between the County and  
 104 either Rockville or Gaithersburg.

105 (1) If the property owner elects to make the improvement, the  
 106 owner must enter into an agreement with a municipality or the  
 107 County, or receive a development approval based on making  
 108 the improvement, before any building permit is issued. The  
 109 agreement or development approval must contain:



- (A) the estimated cost of the improvement, if known then[.];
- (B) the dates or triggering actions to start and, if known then, finish the improvement[.];
- (C) a requirement that the property owner complete the improvement according to applicable municipal or County standards[.]; and
- (D) such other terms and conditions as the municipality or County finds necessary.

(2) The Department of Transportation must:

- (A) review the improvement plan[.];
- (B) verify costs and time schedules[.];
- (C) determine whether the improvement is an impact transportation improvement[.];
- (D) determine the amount of the credit for the improvement that will apply to the development impact tax[.]; and
- (E) certify the amount of the credit to the Department of Permitting Services before that Department or a municipality issues any building permit.

(3) An applicant for subdivision, site plan, or other development approval from the County, Gaithersburg, or Rockville, or the owner of property subject to an approved subdivision plan, development plan, or similar development approval, may seek a declaration of allowable credits from the Department of Transportation. The Department must decide, within 30 days after receiving all necessary materials from the applicant, whether any transportation improvement which the applicant has constructed, contributed to, or intends to construct or

contribute to, will receive a credit under this subsection. If, during the initial 30-day period after receiving all necessary materials, the Department notifies the applicant that it needs more time to review the proposed improvement, the Department may defer its decision an additional 15 days. If the Department indicates under this paragraph that a specific improvement is eligible to receive a credit, the Department must allow a credit for that improvement when taking action under paragraph 2.

[(4)] (4) The County must not provide a refund for a credit which is greater than the applicable tax.]

[(5)] (4) (A) Any credit [issued] that was certified under this subsection on or after March 1, 2004, expires 6 years after the Department certifies the credit.

(B) Any credit that was certified under this subsection before March 1, 2004, expires on February 1, 2016.

(5) The property owner must notify the Department of Transportation of the actual cost of each improvement for which a credit was certified within 90 days after the improvement is completed. Each eligible cost must be expressly authorized in an applicable regulation. Any cost of dedicating land or another right-of-way is not eligible unless the owner shows that the improvement resulted in a loss of density for the development.

(6) If the actual cost of an improvement for which a credit was certified differs from its estimated cost:

(A) if the actual cost is greater than the estimate, the amount of the credit must be increased to cover the actual cost of the improvement;

(B) if the actual cost is less than the estimate:

(i) the amount of any credit that has not been used must be reduced by the difference between the estimate and the actual cost; and

(ii) if any impact tax on the development is owed, the property owner must pay the additional tax.

(c) A property owner may apply to the Director of Permitting Services for a credit for the amount of the development impact tax previously paid if:

(1) the project has been altered, resulting in a decrease in the amount of the tax due; or

(2) the building permit lapses because of noncommencement of construction.

[(d) Reserved.]

[(e)] (d) Any property owner who, before May 1, 2001, built all or part of a project in the Clarksburg planning policy area which is listed in the impact tax transportation program (including building any road which would be widened under the program) is entitled to a credit equal to the reasonable cost of the improvement. The Department of Transportation must calculate the credit. [The Department must not give a refund for a credit earned under this subsection.]

[(f)] (e) A property owner may transfer a credit against the development impact tax to another property owner if the transferor received the credit on or before August 7, 1992, in exchange for the sale of land to

the County. The transferee is entitled to the amount of credit transferred to it, up to the amount of unpaid impact tax the transferee owes. [The Department must not give a refund for a credit used under this subsection.] The Department must not allow more than \$2,750,000 in credits under this [subdivision] subsection.

[(g)] (f) Any [credits] credit for building or contributing to an impact transportation improvement [do] does not apply to any development that is approved under the Alternative Review Procedure for Metro Station Policy Areas in the County Growth Policy.

(g) A refund must not be granted for any credit certified under this Section.

(h) (1) If an improvement has not been completed and the impact tax credit is based on an estimated cost, the property owner must post a surety bond or similar instrument based on the estimated cost of the improvement.

(2) If the property owner does not construct or complete the improvement for which a credit has been issued, the County may use the bond as necessary to construct or complete the improvement.

(3) The Department may revoke a credit when the property owner does not build the improvement for which a credit was certified.

(i) Any credit certified for an improvement located in a municipality must be applied to impact tax payable on development in the same municipality.

(j) Any road or other transportation improvement that is local or internal to a development is not eligible for a credit under this Section.

(k) Any contribution to a transportation improvement must be to a specific project that is fully funded in the County capital improvement program or the similar program of a municipality to be eligible for a credit under this Section.

**52-59. [Reserved] Transportation Mitigation Payment.**

(a) In addition to the tax due under this Article, an applicant for a building permit for any building on which an impact tax is imposed under this Article must pay to the Department of Finance a Transportation Mitigation Payment if that building was included in a preliminary plan of subdivision that was approved under the Transportation Mitigation Payment provisions in the County Growth Policy.

(b) The amount of the Payment for each building must be calculated by multiplying the Payment rate by the total peak period trips generated by the development.

(c) The Payment rate is \$11,000 per peak period trip, unless modified by Council resolution. The Council by resolution, after a public hearing advertised at least 15 days in advance, may increase or decrease the Payment rate or set different rates for different types of development.

(d) The Payment must be paid at the same time and in the same manner as the tax under this Article, and is subject to all provisions of this Article for administering and collecting the tax.

(e) The Department of Finance must retain funds collected under this Section in an account to be appropriated for transportation improvements that result in added transportation capacity in the area where the development for which the funds were paid is located.

**Sec. 2. Expedited Effective Date.**

The Council declares that this legislation is necessary for the immediate protection of the public interest. This Act takes effect on the date when it becomes law.

*Approved:*

---

Nancy Floreen, President, County Council

Date

*Approved:*

---

Isiah Leggett, County Executive

Date

*This is a correct copy of Council action.*

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Linda M. Lauer, Clerk of the Council

Date

# LEGISLATIVE REQUEST REPORT

Expedited Bill 19-10

Taxes –Transportation Impact Tax - Amendments

<b>DESCRIPTION:</b>	Modifies the credits that apply to the Development Impact Tax. Codifies the Transportation Mitigation Payment referred to in the County Growth Policy
<b>PROBLEM:</b>	Terms and provisions in the impact tax law need updating and clarification to be consistent with the way impact tax credits are currently administered. The Transportation Mitigation Payment referred to in the County Growth Policy has never been codified.
<b>GOALS AND OBJECTIVES:</b>	To clarify the application of impact tax credits and refunds and definitions of terms used in the impact tax law, to limit the length of the life of credits; and to codify the Transportation Mitigation Payment requirement referred to in the County Growth Policy
<b>COORDINATION:</b>	Departments of Transportation and Finance; Planning Board
<b>FISCAL IMPACT:</b>	To be requested.
<b>ECONOMIC IMPACT:</b>	To be requested.
<b>EVALUATION:</b>	To be requested.
<b>EXPERIENCE ELSEWHERE:</b>	To be determined.
<b>SOURCE OF INFORMATION:</b>	David Moss, DOT, 240-777-2184 Michael Faden, Senior Legislative Attorney, 240-777-7905
<b>APPLICATION WITHIN MUNICIPALITIES:</b>	The transportation impact tax applies County-wide.
<b>PENALTIES:</b>	N/A

F:\LAW\BILLS\1019 Transportation Impact Tax - Exec Amends\LRR.DOC




OFFICE OF THE COUNTY EXECUTIVE  
ROCKVILLE, MARYLAND 20850

## MEMORANDUM

Isiah Leggett  
County Executive

April 1, 2010

TO: Nancy Floreen, County Council President

FROM: Isiah Leggett, County Executive 

SUBJECT: Expedited Bill Relating to Impact Tax Credits

The purpose of this memorandum is to transmit for the Council's approval a bill which amends County law governing Impact Tax Credits. In the Fall of 2007, the Council reviewed and addressed issues related to the 2007-2009 Growth Policy. As part of that effort, the Council requested that the Executive Branch review and evaluate County law governing the Development Impact Tax for Transportation for the purpose of developing recommendations for possible amendments to that law. On September 15, 2009, I transmitted my recommendations for potential changes to Chapter 52 (Taxation) of the County Code as part of my recommendations on the Growth Policy. This bill implements those recommendations.

The bill is intended to provide clarification and guidance as well as tighten areas of the Code that are considered to be vague or open to multiple interpretations. These recommended changes are, in part, based on actual experience relating to Impact Tax Credit requests over the last several years. It should be noted that the Department of Transportation has, in every instance, evaluated the merits of requests for Impact Tax Credit in a consistent and fair manner with the goal of ensuring that decisions on credits will not result in setting an unacceptable precedent.

This bill is the result of a collaborative effort which has involved the Departments of Finance, Permitting Services and Transportation, Office of the County Attorney, Office of the Executive, and Montgomery County Planning Department of M-NCPPC, as well as Council staff and stakeholders, including, the Maryland National Capital Building Industry Association and the Montgomery County Civic Federation. Please direct any questions relating to this bill to David Moss of the Department of Transportation at 240-777-2184.

### Attachments

c:  
Jennifer Barrett, Director, Finance Department  
Marc Hansen, Acting County Attorney  
Arthur Holmes, Director, DOT  
Carla Reid, Director, DPS  
Diane Schwartz-Jones, ACAO

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OFFICE OF MANAGEMENT AND BUDGET

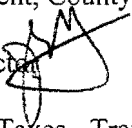
Isiah Leggett  
County Executive

Joseph F. Beach  
Director

MEMORANDUM

May 6, 2010

TO: Nancy Floreen, President, County Council

FROM: Joseph F. Beach, Director 

SUBJECT: Expedited Bill 19-10, Taxes - Transportation Impact Tax - Amendments

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The purpose of this memorandum is to transmit a fiscal impact statement to the Council on the subject legislation.

**LEGISLATION SUMMARY**

This legislation amends Chapter 52 of the Montgomery County Code with respect to the Development Impact Tax for Transportation. The purpose of these amendments is to provide clarification and guidance, as well as, tighten areas of the Code that are considered to be vague or open to multiple interpretations. These recommended amendments are, in part, based on actual experience relating to Impact Tax Credit requests over the last several years.

**FISCAL SUMMARY**

There is no fiscal impact directly related to this legislation. The legislation does not affect how the tax is calculated or collected. It provides clarification and guidance as to the process by which a credit may be certified and supports the way the law has been interpreted and implemented. It provides further clarification on how a determination is made as to whether a transportation improvement is eligible for a credit but there should not be any fiscal impact resulting from the amended language.

The following contributed to and concurred with this analysis: Adam Damin, Office of Management and Budget, and David Moss, Department of Transportation.

JFB:ad

- c: Kathleen Boucher, Assistant Chief Administrative Officer  
Dee Gonzalez, Offices of the County Executive  
Arthur Holmes, Director, Department of Transportation  
Jennifer Barrett, Director, Department of Finance  
John Greiner, Office of Management and Budget  
John Cuff, Office of Management and Budget

Office of the Director

Expedited Bill 19-10, Taxes – Transportation Impact Tax – Amendments – Public  
Hearing testimony – May 11, 2010

Good Afternoon. My name is Emil Wolanin, Chief, Division of Traffic Engineering, Department of Transportation. I am here to present testimony on Expedited Bill 19-10 for the County Executive.

Expedited Bill 19-10 consists of numerous amendments to Chapter 52 of the Montgomery County Code. These amendments are the culmination of an evaluation of the existing Code that was initiated in the Fall of 2007 as the Council completed its review of the 2007-2009 Annual Growth Policy. At that time, the Council requested that the Executive Branch review and evaluate County law governing the Development Impact Tax for Transportation for the purpose of developing recommendations for possible amendments to that law.

This bill is the result of a collaborative effort involving the Executive Branch (including the Departments of Finance, Permitting Services, and Transportation, Office of the County Attorney, Office of the County Executive) and the Planning Department of M-NCPPC, as well as County Council staff and various stakeholders that were engaged, including the Maryland National Capital Building Industry Association and the Montgomery County Civic Federation. The bill modifies and clarifies the Transportation Impact Tax law by adding several definitions and making modifications as well as amendments to the credit section of the law (Section 52-55) and also includes language to codify the Transportation Mitigation Payment in Section 52-59. The recommended

changes that this bill would make are based on actual experience in implementing the Impact Tax law over the last several years. These changes are to provide clarification and guidance as well as to tighten areas of the Code that are considered to be vague or open to multiple interpretations.

Expedited Bill 19-10 will clarify and improve the process by which Impact Tax Credits are certified. It details the reasons for which a refund can be provided and the process for petitioning a refund. The added definitions that are provided in Expedited Bill 19-10 are expected to help reduce the debate over the interpretation of the law by providing additional clarity as to the intent of the law. The bill also includes a provision to establish a six year credit life for any credit issued prior to March 1, 2004, similar to the life of any credit issued after March 1, 2004. In conclusion, the bill will strengthen the existing law, reduce confusion and the likelihood of varying interpretations and help to ensure that decisions on credits will continue to be made in a fair and consistent manner. Therefore, the County Executive asks that the Council support and adopt Expedited Bill 19-10.



**EXECUTIVE COMMITTEE**

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(Liberty Home Builder Inc.)

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Vice President/Calvert County  
(Kettler Brothers Homes LLC)

DOUG MEEKER  
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CARTER WILLSON  
Carter Inc.

Maryland- National Capital Building Industry Association Testimony  
on Expedited Bill 19-10:  
Taxes -- Transportation Impact Tax -- Amendments  
Before the County Council  
May 11, 2010

Good Afternoon, Council President Floreen and Councilmembers. For the record my name is Raquel Montenegro. I am here today on behalf of the Maryland-National Capitol Building Industry Association (MNCBIA). The MNCBIA represents over 650 member firms involved in the building industry here in Montgomery County and throughout our five county-region of suburban Maryland and the District of Columbia. Many of our members work to build and live in communities in Montgomery County.

Thank you for the opportunity to present comments on Expedited Bill 19-10.

- It is unclear from the transmittal memos what problem is being solved by the elimination of the impact tax credit.
- It is inaccurate to state that there is no fiscal impact directly related to this legislation. We believe that pre-2004 transportation impact tax credits should not expire if not used by 2016.
  - The expiration of these credits will substantially change the terms of approval and the underlying financing and assumptions governing approved projects. We would posit that, given the extra-ordinary market conditions that have developed since the passage of Bill 31-03, which created a six-year-life for impact tax credits post-03/2004, that we should be revisiting the rationale for limiting the period, and the inability to extend the period.
- We are very concerned with the timing of the introduction of this bill, as an "expedited" Bill. As noted, the Bill does have serious fiscal impacts, and should not be evaluated in a vacuum, especially when the County Executive has forwarded to the Council, an alternative to the Policy Area Mobility Review that also has serious, hefty fiscal impacts on new development.
- We are very concerned that the transmittal memorandum states that the MNCBIA was part of a collaborative effort. The implication is that the industry supports the changes proposed. Given the constraints of time I would ask that you refer to the August 24, 2009 letter from the MNCBIA that provides detailed comments on the changes to Chapter 25 that were discussed at an August 18 meeting with the County Executive's staff and the DOT.

**BUILDING HOMES, CREATING NEIGHBORHOODS**

Bill 19-10 creates an untenable scenario for projects that have moved forward with some of their mandated infrastructure improvements, and then are stopped for reasons beyond their control. The projects are still required to make the 'improvements' while facing the threat of being forced to pay an impact tax when they are mitigating the very impact that they are being dunned for.

Where's the fairness in that?

Regarding the \$11,000 Transportation Mitigation Payment: we would ask that the Council:

- re-visit the underlying assumptions used to determine the payment-in-lieu. We believe that using BRAC costs, along with out-of-area sources, results in a cost that far exceeds the mitigation required.
- extend the option to projects that have more than 30 trips, for those 'left-over trips' that cannot be mitigated.

In short, we would request that the Council:

- not allow impact tax credits to expire if the facilities are provided as promised by the builder.
- extend "90 days after the improvement is completed" to "180 days after the improvement is completed and bonds are released."
- delete "Each eligible cost must be expressly authorized in an applicable regulation" from Section 52-55 (b)(5). If it is an expense that it would cost anyone, including the County, to build a road, the builder should get a credit for it.
- allow the inclusion of the cost to purchase off-site right-of-way
- evaluate the merits of this Bill in conjunction with the County Executive's 'Transportation Policy Area

Thank you for the opportunity to comment; our members look forward to participating and providing real world input at the worksessions



# RECEIVED

AUG 27 2009

DOT-DEPARTMENT OF TRANSPORTATION  
DIV. OF TRAFFIC ENGINEERING & OPS.  
MONTGOMERY COUNTY, MD

MARYLAND NATIONAL CAPITAL BUILDING INDUSTRY ASSOCIATION  
725 Edison Road, Suite 200, Silver Spring, Maryland 20903  
(301) 445-5400 / Fax (301) 445-5499  
Email: communications@mncbia.org  
Website: www.mncbia.org

to: **Raquel Montenegro**

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August 24, 2009

Mr. David Moss  
Montgomery County Department of Transportation  
100 Edison Park Drive  
4<sup>th</sup> Floor  
Gaithersburg, Maryland 20878

Re: Revisions to Chapter 52 "Development Impact Tax for Transportation

Dear Mr. Moss,

The Maryland-National Capital Building Industry Association (MNCBIA) was invited by Diane Schwartz Jones to attend a meeting on Tuesday August 18, 2009, to discuss proposed changes to Chapter 52, pertaining to development impact tax for transportation. Although members of our industry believe that valuable discussions took place and suggested changes/revisions be implemented, as the designated County point person per Diane Schwartz Jones, I wanted to reiterate to you our position regarding the changes.

I will present the MNCBIA position in the order of the "Confidential Draft" document (copy attached) which was presented at the meeting. Our comments are based on the concepts discussed and will be revisited when the specific language of the text amendment is available.

### Section 52-55 – Refunds for Credits

Our Association understands the need to clarify the language within section 52-55; however we cannot agree that "under no condition" can a refund be allowed. There were four circumstances discussed in the meeting where a refund would be fair and appropriate: 1.) Error, 2.) Refund currently contemplated by revisions, 3.) Payment of an Impact Tax prior to approval of a tax credit agreement, and 4.) If a post-construction reconciliation of construction costs becomes required. These are in addition to Section 52-54. Due to the timing of the Impact Tax Credit Agreement and building permit applications, there could be circumstances under which the impact fee is paid and the credit should be applicable, thereby resulting in a potential refund. There were also discussions at the meeting about basing the credits on actual construction costs, which will not be known at the time of the Agreement and therefore could result in an impact tax refund to an applicant.

### BUILDING HOMES, CREATING NEIGHBORHOODS

Representing the Building and Development Industry in Calvert, Charles, Montgomery,  
Prince Georges and St. Mary's Counties and Washington, D.C.  
Affiliated with the Maryland State Builders Association and the National Association of Home Builders

A policy of fairness needs to be applied in regards to the applicant and to the County. If the applicant is due a credit in respect to the impact tax paid, it should not matter whether the impact tax was paid prior to the Agreement being executed. A refund of dollars paid is the fair approach; in a circumstance where the construction cost was actually lower, and the County allocated credits, the County should be refunded any difference.

#### Section 52-55(b) – Surety for Credits based on Estimated Costs

Our Association understands the concern of DOT in the event an applicant who has received the credit fails to construct the improvement on which the credit has been based, although our understanding is that this is very rare circumstance. The Association can agree to posting a bond based on approved cost estimates by DPS, and have the ability to transfer the bond at the time of the construction permit. This would prevent a double bonding scenario. Especially considering that in today's market it would be extremely difficult to obtain a bond on unapproved plans. The applicant would post the bond at the time the first building permit application is applied for utilizing a tax credit, but not at the time of the execution of the Agreement. This approach would protect the County from failure of the applicant to perform and the applicant would be unable to use the credit until the surety is posted.

#### Section 52-55 – Credits

Our Association understands the need for the County to have the authority to revoke a credit if the applicant defaults on the Agreement. As Michael Fadden mentioned at the meeting, the default needs to be material such as, "not building the required improvement". The law needs to be clear that minor mistakes, typos in the Agreement, or not properly filing follow-up paperwork do not constitute Default. The revocation of a credit is a large penalty and therefore must be proportional to the level of default. Again fairness needs to be considered in regards to how the law is written. The intent of the law is for transportation capacity to be provided, and for applicants to pay for the improvements through construction of the facilities or payment of the tax. If the applicant constructs the facilities they should not be considered in default

#### Section 52-55(b) – Follow-up for Credits based on Estimated Costs

Our Association agrees that the final accounting in regards to credits should be based on actual construction costs, including other items such as land acquisition costs. It is imperative that the impact tax credit work both ways: i.e. if the construction costs come in lower than the estimate (and the amount of credit received) the applicant is responsible for the difference, and if the construction costs come in higher, the County is responsible for increasing the credit amounts for all applicable credits, either given or to be given. In cases where the applicant has paid impact tax but a post-construction reconciliation increases the amount of credit, the County will refund the difference.

#### Section 52-55(b) – Credits for Contributing To an Improvement

Our Association agrees that the credit request needs to be for a programmed improvement and not an unknown improvement to be determined at a later date. However we cannot agree that credits should not be given where an applicant is willing to participate in a road club and provide its prorated share of the programmed improvement, as long as the staged impact per the approved traffic report is met.

Section 52-55(b) – Life of a Credit

Our Association understands the County's concern regarding the life of a credit. We could support a specific term, but do not believe six years is sufficient, especially in today's economic climate and the time it takes for large-scale, phased projects to be completed. With the recent extension of the APFO approvals by the County Council, it makes sense to have at a minimum an eight to ten year life span for credits to be used. A provision should be added to allow for the life span to be, at a minimum, the same length of time as the APFO approval and the ability to request an extension of the credit life.

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Section 52-55(b) – Improvement Costs relevant to the Amount of a Credit

Our Association agrees with the proposed revisions, as long as costs are considered for offsite land acquisitions and easements, or loss of density to the applicant's project due to land dedication over what is necessary for the improvements as part of the credit basis.

Section 52-55(d) – Development District References

Our Association has no issue with this item.

Section 52-55 – Use of Credits

Our Association has no issue with this item and understands that credits need to be associated with programmed improvement in the immediate vicinity of the project and not in other locations within the County, unless the programmed improvements are located within a Municipality.

Section 52-58(a) – New Capacity

Our Association understands the concern of the County in regards to what "new" capacity means. Our position is that any improvement which provides "new" capacity, no matter how minor the improvement may be, should be eligible for impact tax credits.

Section 52-58 – Sidewalk Connectors

Our Association believes this issue is better resolved in the Executive Regulations instead of revising the code. We would welcome the opportunity to review the exact language concerning the definition of Sidewalk Connectors. The example presented at the meeting of a religious entity requesting a tax credit for sidewalk connections, brings to point that: if the facility is large enough to have a positive impact to the transportation system by adding a sidewalk connection, then it should be considered for a tax credit.

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Section 52-58(h) – Eligible Operating Expenses

Our Association believes this issue is better resolved in the Executive Regulations instead of revising the code. As with Sidewalk Connections we would welcome the opportunity to review the exact language concerning the definition of eligible operating expenses.

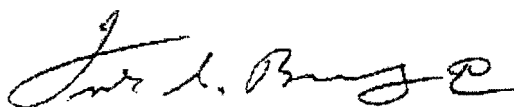
The Association appreciates the opportunity to meet with County representatives on these proposed code changes to Chapter 52 and to voice our concerns and suggestions for improvements. Although the above responses only deal with the draft document at hand, there are other related issues that our Association believes should be considered.



Our Association strongly believes that the credits for State road improvements should be permitted in Section 52-55(b). Many of the congested roadways within the County which need improvements are State roads. The significant dollars required to improve these roadways are frequently borne by our members while providing the much needed capacity to the citizens of Montgomery County without the benefit of Transportation Impact Tax Credits. We still pay the Impact Tax, construct the improvements, but do not receive any tax credit. We hope that this can be part of the discussion very soon, as well as suggested changes to the School Impact Tax regulations for Impact Tax credits for school property dedications. Additionally, we support the recently submitted Bill, by Councilmember Marc Elrich, which would negate the recent impact tax increase.

Thank you for the opportunity for our Association to give input. Should you have any questions or should you like a follow-up meeting, please contact me.

Sincerely,



Frank G. Bossong IV, P.E. LEED-AP  
Vice President - Montgomery  
Maryland National Capital Building Association

cc: Diane Schwartz Jones  
Edgar Gonzalez

4

Miller and Smith Testimony on  
Bill 19-10 - Taxes – Transportation Impact Tax – Amendments  
May 11, 2010

Good afternoon, I am Bob Spalding with Miller and Smith. We own the Eastside neighborhood in Clarksburg. We were approved for 265 TH and 2/2s on June 20, 2007. As part of that approval, we are required to reconstruct and widen ½ mile of Shawnee Lane from a 2 lane road to a 4 lane divided arterial road, including a stream crossing in the Clarksburg SPA. The existing road disappears – it becomes the median.

Our cost for this improvement is approximately \$5.25 million. Based on current rates, our transportation impact tax bill is \$2.75 million. Because the road is \$2.5 million more than our tax bill, we do not have to pay the transportation impact tax when we receive a building permit. We receive a credit – but not a refund.

The economy and residential market has been terrible, we have just started grading, and hope to start selling houses in 2011. The additional interest expense over the last 3 years and the declining prices of homes already have had a severe and negative impact on Miller and Smith to the point that we expect to lose millions of dollars and are developing the property in order to pay our lender. If you pass this bill and it takes us more than 6 years to build our neighborhood, Montgomery County gets the road we promised, but we lose our impact tax credit and we have to pay even more, even though our transportation impact doesn't change. Where's the fairness in that?

The transportation impact tax has increased 433% (\$2.2 million) and the school impact tax has increased 424% (\$2.3 million) for a total of \$4.5 million since we signed the contract to buy the property in 2004. We expect uncertainty in the economy, but if we cannot rely on the approval conditions such as the tax credit and tax rates, lenders will not advance the capital to finance these public improvements and we lose even more money.

Our recommendations are:

1. Delete proposed sections of 52-55 (a)(2), (a)(3), (b)(4)(A), and (b)(4)(B). Don't allow impact tax credits to expire if the facilities are provided as promised by the builder.
2. In Section 52-55 (b)(5) Change "90 days after the improvement is completed" to "180 days after the improvement is completed and bonds are released." The billing and payment process from the various contractors involved in completing a road and achieving bond release could make the 90 day period too short. Bond release is easier to define than "completion."
3. Delete the phrase "Each eligible cost must be expressly authorized in an applicable regulation" from Section 52-55 (b)(5). I continually hear frustration from other builders about the difficulty of getting credit for common costs of building a road. There are

myriad and legitimate expenses to build a road and “applicable regulations” rarely keep up with the actual costs and ever-changing County agency requirements. If it is an expense that it would cost anyone, including the County, to build a road, the builder should get a credit for it.

4. Delete proposed section 52-55 (h). We already are required to bond road improvements to get permits. This text is unclear on the timing of the bond and could result in having to bond it twice.

The impact tax is based on a simple principle – new development pays a tax based on its proportional impact. If the development constructs transportation improvements, the tax should be reduced on a dollar for dollar basis. We are not arguing with that. In fact, we are asking the Council to uphold this balanced and fair principle.

I want to leave you with a couple of questions to consider along with this bill:

1. If the Planning Board, as permitted by law, recognizes that the size of a project and the complicated process of acquiring off-site ROW deserves a longer approval period, why should it be undercut by the impact tax law?
2. Why should the builder be financially punished if the public gets to use the road for years before the houses paying for the road are built and create the impact?
3. Why is it fair for a credit to expire, if the road capacity that we pay for still exists for decades (or centuries) after we build it?

Thank you for your consideration and we hope that you make the administration of the transportation impact tax fair and balanced.

To: Montgomery County Council

Re: Expedited Bill 19-10 – Impact Taxes

Date: May 11, 2010

My name is Paul Chod. I am the President of Minkoff Development Corporation, the developer of Seneca Meadows Corporate Center on the east side of I-270 in Germantown.

Seneca Meadows currently has 11 buildings containing about 750,000sf of office, biotech, medical, hi-tech and flex space. Development started on our 156 acre site in 1998, and has proceeded actively in conjunction with the real estate market since then. We have started the site plan approval process with Park & Planning to add a mixed use retail and office development anchored by Wegmans Food Store that will add about 240,000sf on the north end of our property in 2012. We already have site plan approval for another 60,000sf office building in phase 3 of our development. We have submitted a build-to-suit proposal to a Fortune 100 company for 175,000sf of office and manufacturing space on our vacant Lot 8, and are negotiating with another build-to-suit, marquis name tenant for about 100,000sf of office space on our vacant Lot 10. There is no certainty however, as to if and/or when these build-to-suits will occur. We don't know today when we will finish development of our site.

Section 52-55 of Expedited Bill 19-10 poses a major problem to us, as well as to any developer of a large tract. It states that *"Any credit that was certified under this subsection before February 1, 2010 expires on February 1, 2016."* The author of this amendment has decided that there should be a time limit on the life of our impact tax credits. I would like to know why.

The Bill is going to punish us if we have not received our last building permit by February 1, 2016. Why? Is the County trying to tell us when to build? Does the County want buildings going up if the market is down? Why does it hurt the County if we carry impact tax credits forward? We have the credits because our roads and public infrastructure improvements were all built and completed before any buildings went up, and before we generated any traffic. We were told that we would have credits we could apply in the future. Now we are being told that our credits might be voided. There is no demonstrable public interest that is being served by extinguishing our impact tax credits; however, this does present a repudiation of a "deal" between the County and a developer. Why? No developer would take longer than he has to, as dictated either by the market or by local governmental regulations, to develop his site.

The problem is that this Bill, just like Park & Planning's preliminary plan process, treats large and small properties the same. They are given the same time limits for development, even though everyone knows that it takes longer to fully develop and build-out a 156 acre site than a 5 acre site. Park & Planning does have a provision that allows the life of an approved preliminary plan to be extended. This bill, at a minimum, needs a similar provision.

I ask that you please remove the provision in Bill 19-10 that puts a time limit on the life of impact tax credits. These credits represent dollars spent by the developers, NOT by the County. At a minimum, if there is a plausible reason for a time limit, attach it only to small parcels where complete development usually proceeds quicker. You could attach it to larger parcels if no development has occurred for a long period of time in a favorable market. There is no reason for punishing a developer for spending his money up front. If you don't change this provision in Section 52-55 of Bill 19-10, you will be reinforcing the current mindset that Montgomery County (i) is not friendly to or supportive of business and development, (ii) is more expensive to develop homes for businesses, and (iii) is not working to keep businesses and jobs in the County. If you do that, we will all regret it in the future.

Thank You.



ATTORNEYS

June 7, 2010

057494

**BY HAND DELIVERY**

The Honorable Nancy Floreen and Members of the  
Montgomery County Council  
Stella B. Werner Council Office Building  
100 Maryland Avenue  
Rockville, Maryland 20852

**Re: Expedited Bill 19-10 – Impact Taxes**

Dear President Floreen and Members of the Council:

Thank you for the opportunity to present testimony on Expedited Bill 19-10 – Impact Taxes (the “Bill”). We are submitting this letter on behalf of Davis Brothers Montgomery Farm Limited Partnership and Camalier Limited Partnership, who are directly impacted by the proposed legislation. As proposed, the Bill would retroactively impose a six-year expiration on these types of impact tax credits that are not currently subject to a time limitation on their use. We respectfully urge that the Council reject this proposal to retroactively limit the use of credits. These credits arise under pre-existing approvals (and agreements) and have been confirmed under the impact tax law. The credits should remain available without a time limit as allowed by existing law.

Davis Brothers Montgomery Farm Limited Partnership and Camalier Limited Partnership obtained impact tax credits for substantial public improvements they provided as part of their Rock Spring Park development. They made investments in public infrastructure up front in improvements that provide substantial benefits to the area by reducing congestion on the road network (*i.e.*, adding capacity). The expectation has always been that these credits would be available for the project without the possibility of expiring. This expectation was reiterated and confirmed as part of a Settlement Agreement with the County (regarding an appeal of the impact tax credit amount), in which the County agreed that the impact tax credit would not expire. The public certainly has benefitted from the infrastructure provided and equity dictates that the impact tax credits be allowed to be used without the threat of expiration.

Generically speaking, multi-phased projects can take many years to complete. Yet, developers often construct their transportation improvements up front. To limit a credit after the improvements have been provided would effectively be a double payment by the developer. The developer already would have paid for the infrastructure to accommodate the traffic impacts and, rather than crediting the

ATTORNEYS

The Honorable Nancy Floreen and  
Members of the Montgomery Council  
June 7, 2010  
Page 2

cost against impact taxes, the impact tax would then have to be paid – truly a double payment. When the Council previously amended the impact tax credit law, the Council recognized that it would be unfair to retroactively place a time limit on credits for these earlier approvals. We ask for the same fairness in this Bill by eliminating the retroactive application of the six-year time limitation on pre-existing credits that presently are not subject to such a limit.

Under certain existing credit agreements with the County such as the one discussed above, the impact tax credits are recognized as being unlimited in duration. The County and developer already have reached an agreement by quantifying and thereafter certifying the applicable amount of the credit. These credit agreements represent a contractual relationship between the developer and the County – wherein the terms and conditions of the credit agreement have been relied upon, improvements have been constructed and the validity period for the credits cannot now be unilaterally changed or limited by the County.

At the hearing on this Bill, the County articulated that one reason the Bill should be approved is because the credits would be easier to account for. County record keeping is not a sufficient basis to limit, in time, previously unlimited impact tax credits. Moreover, this reasoning should be rejected, particularly given the significance of and reliance on the credit, without the threat of expiration. Again, developers like those in this particular situation have the credits because the roads and public infrastructure improvements were all built and completed before all of the private construction was in place. Developers were told that they would have the credits to apply in the future. Now, through this legislation, developers and property owners, like our clients, are being told that the credits would expire if not used by 2016. There simply is no demonstrable public interest that is being served by the extinguishment of the impact tax credits.

We are all painfully aware of the downturn in the economy and the result it has had on the real estate industry. In fact, in light of the economic downturn and its impact on the development industry, the Council last year passed Subdivision Regulation Amendment No. 09-01, which extended the validity period of Preliminary Plans and adequate public facility approvals for two years. The Council recognized that development projects could not realistically move forward and should be given more time in which to implement their approvals. The proposed treatment of impact tax credits pursuant to the Bill is totally inconsistent with the Council's other actions related to the economic downturn. There is no reason to amend the law in such a way as to shorten the life of those credits that are not already subjected to the six year time period.



ATTORNEYS

The Honorable Nancy Floreen and  
Members of the Montgomery Council  
June 7, 2010  
Page 3

We respectfully request that the Council consider the comments raised in this letter and refrain from imposing a six year time limit on credits that previously were not subject to an expiration period. Equity and fairness alone justify this result.

Very truly yours,

Steven A. Robins

Patrick L. O'Neil

cc: Michael Faden, Esq.



Expedited Bill No. 19-10 (Transportation Impact Tax Amendments)

Testimony of William Kominers

(May 11, 2010)

Good Afternoon President Floreen and Members of the Council. My name is Bill Kominers, an attorney with Holland & Knight and I am here today on behalf of Tower-Dawson, LLC and The Tower Companies, the original developers of the Tower Oaks Project in the City of Rockville, located along I-270 at Wootton Parkway.

I am here this afternoon to oppose certain changes proposed by Bill No. 19-10 at Lines 91-95, that would affect a very limited class of Impact Tax credits -- those arising from project approvals before 2002. As proposed, the Bill would retroactively impose a six-year expiration on these credits, credits that are not currently subject to a time limit on their use. I ask you to preserve, both retrospectively and prospectively, the treatment of this narrow group of credits that are certified under Section 52-55(a). You should simply delete Lines 91-95 from Bill No. 19-10. To properly understand why the proposed revision should not be made, the background of the Impact Tax, as well as the history of the Tower Oaks Project, must be considered.

Tower Oaks

Tower Oaks is a large scale, mostly commercial, mixed use, planned development in the City of Rockville, approved before 2002. The project was expected to be built out over at least 20 years. The City Council Resolution approving the overall Concept Plan

for the Project has extensive road construction staging requirements tied to specific quantities of development.

Unlike many others, instead of waiting for each stage of development, Tower-Dawson constructed or contributed to all of the required road improvements up front. These improvements include: (1) Wootton Parkway, (2) Tower Oaks Boulevard, and (3) improvements to Montrose Road and to the Montrose Road/I-270 Interchange, to name but a few. Notwithstanding these extensive road improvements, because of economic conditions, the first office buildings were not begun until approximately eight years after the road improvements were completed.

This occurred in the ancient days before the Countywide Impact Tax, so there was no Impact Tax that applied in Rockville. (The Impact Tax did not extend to Rockville until the Countywide Impact Tax District was created in 2002.)

After the Impact Tax was imposed in the City, Tower-Dawson sought a determination from the County about eligibility for credits. The County confirmed that the road improvements were eligible and would fall under Section 52-55(a), such that the later amendments that limited the life of credits, did not apply. (See attached letter from the Department of Public Works and Transportation, dated May 24, 2004.)

A joint Impact Tax credit application was filed in 2006 by Tower-Dawson and Boston Properties (which is developing a portion of Tower Oaks). This was a very complicated application. Since being filed, some credits have been certified and others are still under consideration by the Department of Transportation ("DOT"). The property owners have worked closely with DOT in the certification process, including on those

road improvements that have not yet been certified. This effort has always assumed that the developers would have as long as needed to implement the credits, once certified.

The Tower Oaks Project has proceeded at a deliberate and careful pace. Time has been taken to find the right tenants and create the right building and site designs. Building has not been rushed merely to meet deadlines. Tower-Dawson has been a leader in environmental design principles at Tower Oaks. The new building at 2000 Tower Oaks Boulevard is a LEED platinum building that has won numerous awards. The earlier Tower Building, at 1101 Wootton Parkway, even though it was built before LEED standards existed, incorporated green design principles and has received several "green building" recognitions.

Tower-Dawson made an investment in public infrastructure up front for improvements that benefit the region by reducing congestion on the road network of the area. The expectation was that the developer would have the life of the project approval in which to recoup that up front investment. The public has benefited from that infrastructure investment since the roads opened -- probably more so than the property owner, as the development has taken so long to build. Justice and equity require that the Impact Tax credits be allowed to be used during the course of this approval as well.

#### Impact Tax Amendments in 2003

The Council created the six-year limit on the use of credits in the 2003 amendments to the Impact Tax. But those amendments specifically refrained from changing the life of credits for projects approved prior to July 1, 2002, such as Tower Oaks. While limiting the credits prospectively for work to be done in the future, the

Council recognized that it would be unfair to retroactively place a time limit on credits for these earlier approvals.

Bill No. 19-10 Is Inequitable to Pre-2002 Approvals

As drafted, Expedited Bill No. 19-10 would retroactively limit the life of Impact Tax credits under Section 52-55(a) to six years. This is patently unfair to those who have already relied on the longer life, and would violate the reasonable expectation of those developers, like Tower-Dawson, who entered into agreements with the County or municipality to build or contribute towards the transportation improvements for their entire project.

The contract between the County or municipality and the developer did not anticipate that any additional money for transportation improvements (such as Impact Taxes) would be assessed. To limit that credit now would effectively cause a double payment for roads by the property owner. First, the developer would have paid to build the roads to accommodate the traffic impacts of the individual project. Now, rather than crediting that cost against the Impact Taxes for general road improvements, the Impact Tax would have to be paid, thus requiring payment for road improvements a second time (notwithstanding that the specific roads already built were designed to accommodate the impacts of the project.)

Additional Inequitable Revisions

As drafted, the new Section 52-55(a) of the Bill also eliminates credits for internal roads -- irrespective of their purpose (Lines 214-215). But roads that are within or traverse a project can still have wider benefits to the network generally. This language

should be altered, particularly for projects approved prior to July 1, 2002, which have a specified set of transportation improvements which must be built under an agreement or conditioned approval with the County, state or a municipality. In the case of Tower Oaks, the "internal roadways" constructed or paid for as part of the project include Wootton Parkway and Tower Oaks Boulevard. These roadways may be physically within the project site, but they serve traffic well beyond what is generated by the site, and neither road begins nor ends within the site. Roadways such as these should not be excluded from Impact Tax credit eligibility simply because they are within the project site.

#### Inconsistency of Shortening the Time for Use of Credits

As we all are painfully aware, the downturn in the national and local economies has resulted in stagnation of most development activities. In light of the economic downturn and its impact on the development industry, the Council last year passed Subdivision Regulation Amendment No. 09-01 ("SRA 09-01"), which extended the validity period of preliminary plans and APFO approvals for two years. With SRA 09-01, the Council recognized that development projects could not realistically go forward and should be given more time in which to implement their legitimately granted and expensively sought approvals. The proposed treatment of Impact Tax credits in Bill No. 19-10 is totally inconsistent with the Council's other actions in recognition of the economic conditions.

### Purpose of Bill No. 19-10

The memo from the County Executive (circle 13) stated that the "purpose of these amendments is to provide clarification and guidance, as well as, tighten areas of the Code that are considered to be vague or open to multiple interpretations." The changes are also said to have "no fiscal impact". As to the pre-2002 approval provisions to which this opposition is directed, the amendments certainly are not mere "clarifications," but instead are substantive changes in the current law that will have a significant fiscal impact on every affected developer.

The Executive's prior comments on the Draft 2009 Growth Policy stated the following regarding Impact Tax credits that were certified under Section 52-55(a) and had no limitation on their validity:

"Many of these are for older credits for which there is no opportunity for the credits to be issued in lieu of tax paid. Yet, these credits must remain on the books and must be considered when calculating potential impact tax revenue even though they will never be used."

"Never be used" is certainly not the case for the Tower Oaks project. Tower Oaks is an ongoing development, for which additional permits will be issued, and certified credits will be utilized.

If the desire is to remove from the books unused credits from projects that are no longer valid, this can be accomplished by limiting the life of the credits to the life of the project approval from which the credit arises (including any extensions granted). Cleaning up the County's books should not be done by eliminating the ability to utilize

credits that are properly issued for applicants, if the applicant still has the authority to use the credits.

Should the Council desire to come closer to "no fiscal impact," then if credits cannot be used within the new statutory period, refunds should be provided upon expiration (see below).

### Refunds

If a six-year time limit is placed on these pre-2002 credits, then a refund should be allowed if the credits cannot be used. There was never a need for refund before, because the credit could always be used against a future permit, whenever that occurred.

To accomplish this refund approach, continue the deletion in Lines 89-90, but revise Subsection 52-55(g) in Lines 199-200 to read: "(g) Upon expiration, a refund must be granted for credits certified under Subsection 52-55(a), otherwise, a refund must not be granted for any credit certified under other subsections of this Section." (See Attachment 1.)

### Recommendations

To correct the unfair impacts of Bill No. 19-10, I recommend that you do several things:

1. Protect and preserve the rights to credits already certified or applied for under Section 52-55(a) for pre-2002 development approvals by deleting Lines 91 through 95 of the Bill.

2. Alternatively, if the Council really wants to place a time limit on use of credits for 2002 approvals (which I do not recommend), tie the expiration to the life of

the approval (including any extensions) that gave rise to the obligation to build the road improvements. In the case of Tower Oaks, that would be the Concept Plan for Comprehensive Planned Development.

3. Clarify that currently pending credit applications will continue to be governed by the law existing at the time the application was filed. This will assure that the careful, deliberate, but sometimes slow analysis by DOT, does not penalize an applicant by delaying a determination of credits until there is a change in the law.

4. Clarify that roads that may be "internal" to a project site, but that serve traffic beyond what is generated by that site, remain eligible for credit. Although physically internal to an individual project, the impact and benefit of those roads is very external. (Section 52-55(j).)

5. Delete Section 52-55(k) (Lines 216-219) with respect to pre-2002 approvals. The creditable roads already need to be subject to an agreement with government, and must provide additional capacity. Transportation capacity under those agreements did not need to come only from fully-funded CIP roads. Often, the road was built through developer funding precisely because it was not fully funded in the CIP.

Attached as Attachment 1 to my testimony are possible specific amendments to correct the language of Bill No. 19-10.

Please note that I make no comment at this time regarding the other portions of Bill No. 19-10.

Thank you for your consideration. I look forward to discussing this further in the worksessions.



## ATTACHMENT 1

### 1. Approvals Before 2002 (Lines 91- 95.)

Revise Lines 91-95 as follows:

A. Alternative 1: (2) Any credit that was certified under this subsection before February 1, 2010, [expires on February 1, 2016. (3) Any credit that] or is certified under this subsection after February 1, 2010, expires [6 years after the Department of Transportation certifies the credit.] with expiration of the validity period, including any extensions granted, of the approval for the project.

B. Alternative 2: (2) Any credit [that was certified under this subsection before February 1, 2010, expires on February 1, 2016. (3) Any credit that is certified under this subsection after February 1, 2010, expires 6 years after the Department of Transportation certifies the credit.] now or previously certified under this subsection, [ ] expires with expiration, including any extensions granted, of those approvals for the project that included the requirement for the improvements for which the credit is certified.

### 2. Pending Credit Applications (following Line 95)

Add a new Subsection 52-55(a)(4) as follows:

(4) Any credit application under this Subsection 52-55(a) that is pending as of [date of enactment] or filed in the future, must be reviewed and processed in accordance with the provisions of the law existing at the time the application was filed.

3. **Refunds (Lines 199-200)**

Revise Lines 199-200 as follows:

(g) Upon expiration, a refund must be granted for credits certified under Subsection 52-55(a), otherwise, a refund must not be granted for any credit certified under [this] other subsections of this Section.

4. **Internal Roads (Lines 214-215.)**

Revise Lines 214-215 with the following:

(j) Any residential street [road or other transportation improvement] that is local or internal to a development and serves only that development is not eligible for a credit under this Section.

5. **Fully-Funded CIP Requirement (Lines 216-219.)**

Delete Subsection 52-55(k) in its entirety, or revise Subsection 52-55(k) as follows:

(k) Except for credits certified under Subsection 52-55(a), any contribution to a transportation improvement must be to a specific project that is fully funded in the County capital improvement program or the similar program of a municipality to be eligible for a credit under this Section.

**MULTI-EMPLOYER PROPERTY TRUST'S TESTIMONY  
BEFORE THE MONTBOMERY COUNTY PLANNING BOARD  
County Bill No. 19-10  
July 15, 2010**

Good afternoon. My name is Patrick O'Neil with the law firm of Lerch, Early & Brewer and I am here today on behalf of our clients, Multi-Employer Property Trust and its development partner, the Trammell Crow Company, regarding the Milestone Business Park located along I-270 in Germantown, Maryland. The purpose of my testimony is to strongly support the comments of my colleagues, Bill Kominers and Steve Robins, in opposing any use deadline in County Bill 19-10 for Impact Tax Credits for projects approved before July 1, 2002. I am also here to propose an additional use for this narrow class of certified Impact Tax Credits that would advance the County's objective of cleaning its books of these unlimited Credits. The balance of my testimony concerns the latter issue.

In 1995, the prior property owner of Milestone Business Park earned Impact Tax Credits in excess of \$22 million for their expenditures in constructing Father Hurley Boulevard and Observation Drive. These improvements were related to anticipated development at Milestone Business Park and Seneca Meadows Office Park. Multi-Employer Property Trust (or MEPT) subsequently acquired the Milestone Business Park, along with the related Impact Tax Credits. These Impact Tax Credits were unlimited in duration and the value of the Credits was reflected in the purchase price. Since the time of the purchase, MEPT has developed almost 500,000 square feet of Class A office buildings on the Milestone property and has preliminary plan approval to develop approximately 430,000 additional square feet of office space at the site. The remaining balance on MEPT's Impact Tax Credit account is approximately \$15.5 million. Due to market and other reasons, the Adequate Public Facilities approval lapsed for the undeveloped portion of the site and MEPT is currently poised to file an APF application to recapture the expired density. The new APF approval will undoubtedly have Local Area Transportation Review and Policy Area Mobility Review obligations.

Here is the issue: Milestone needs the opportunity to utilize its current Impact Tax Credits amounting to \$15.5 million. Even if MEPT had APF authority to develop the remainder of the Milestone property, it would still retain the vast majority of its 1995 Impact Tax Credits after applying the Credits to its Impact Taxes for new

buildings. To address this dilemma and allow the County to clean up its books on unlimited Impact Tax Credits, we propose a modification of Section 52-55(a) of proposed Bill 19-10. The modification would allow the holders of Impact Tax Credits that were certified before July 2002, such as MEPT, to use the Credits to satisfy transportation obligations as broadly defined, including LATR and/or PAMR requirements.

Our proposal allows the County to achieve its bookkeeping policy objective. It also provides an equitable solution for Impact Tax Credit holders who obtained the credits for value (or in exchange for significant County transportation improvements) and have no real opportunity to fully capitalize on their investments. Lastly, our proposal allows the County to benefit from significant and tangible economic development opportunities.

It is no secret that Montgomery County is in constant competition with Frederick County, among other areas, for high profile office tenants. Office sites in Montgomery County are at a significant cost disadvantage in relation to Frederick County sites due primarily to the following: Impact Taxes (\$10.40 per square foot); significant LATR obligations; PAMR mitigation costs (\$11,300 per trip); and the price of land. The difference between a Fortune 50 Company choosing between Montgomery County and Frederick County is often only a marginal difference in rent. If property owners, such as MEPT, could use its Impact Tax Credits to offset LATR and PAMR obligations, they could reduce the rental cost disadvantage and attract more high quality employers to Montgomery County – and away from Frederick County. A Fortune 50 company is currently considering this choice.

On behalf of MEPT and Trammel Crow Company, we respectfully request that the Planning Board recommend the elimination of any deadline in Bill 19-10 for the use of currently unlimited Impact Tax Credits. In addition, we request the Planning Board's recommendation to modify Bill 19-10 as discussed today and as proposed on the attachment we are submitting with this testimony. Thank you for the opportunity to present these comments.

## MEPT's PROPOSED CHANGES TO COUNTY BILL 19-10

### Sec. ~~52-55~~. Credits.

- (a) (1) A property owner is entitled to a credit if the owner, before July 1, 2002, entered into a participation agreement, or a similar agreement with the state or a municipality, the purpose of which was to provide additional transportation capacity. A property owner is also entitled to a credit if the owner receives approval before July 1, 2002, of a subdivision plan, development plan, or similar development approval by the County or a municipality that requires the owner to build or contribute to a transportation improvement that provides additional transportation capacity. The Department of Transportation must calculate the credit. The credit must equal the amount of any charge paid under the participation agreement. The Department may give credit only for building permit applications for development on the site covered by the participation agreement. The Department must not give a refund for a credit earned under this subsection.

~~(2) Any credit that was certified under this subsection before February 1, 2010, expires on February 1, 2016~~

~~(3) Any credit that is certified under this subsection after February 1, 2010, expires 6 years after the Department of Transportation certifies the credit.~~

~~(2) Any credit that is certified under this subsection may be applied to satisfy any transportation obligations, in addition to impact taxes.~~



**MONTGOMERY COUNTY PLANNING DEPARTMENT**  
THE MARYLAND-NATIONAL CAPITAL PARK AND PLANNING COMMISSION

MCPB  
Item# 10  
July 15, 2010

July 7, 2010

**MEMORANDUM**

**TO:** Montgomery County Planning Board

**VIA:** Dan Hardy *to for DH*  
Move/Transportation Planning Chief

**FROM:** Shahriar Etemadi (301-495-2168)  
Move/Transportation Planning Supervisor *[Signature]*

**SUBJECT:** Montgomery County Bill No. 19-10, Transportation Impact Tax Credit

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**RECOMMENDATION**

We have completed our review of the Proposed Montgomery County Council Bill 19-10 and recommend that the Planning Board transmit the following comments to Montgomery County Council:

1. Staff suggests some minor edits to the definition of "transportation capacity" by amending Lines 4 through 13 of Bill 19-10 as follows:

*Additional capacity* means any new road, widening an existing road, adding an additional lane or turn lane to an existing road, or another transportation improvement that:

- (a) Increases the maximum theoretical volume of traffic, including consideration of vehicle occupancy factors, that a road or intersection can [absorb] accommodate; and
- (b) Is designated as arterial or higher classification in the County's Master Plan of Highways, or is similarly designated or classified by a municipality.

*Additional capacity* is sometimes referred to as added "highway capacity," "transportation capacity," or "intersection capacity"

2. Section 52-59 ( b ) should be amended so that Lines 228 to 230 of Bill 19-10 read:  
The amount of the Payment for each building must be calculated by multiplying the Payment rate by the total peak [period] hour vehicle trips generated by the development.
3. The payment rate of \$11,300 per peak period trip should change by amending section 52-59-( c ) so that Lines 231 through 234 of Bill 19-10 read:  
The Payment rate is \$11,[000]300 per peak [period] hour vehicle trip, and unless County law requires otherwise, the board must index the minimum payment according to construction costs in each later fiscal year. [unless modified by resolution, after a public hearing advertised at least 15 days in advance, may increase or decrease the Payment rate or set different rates for different types of development.]
4. The proposed six-year expiration period for impact tax credits proposed as new Sections 52-55(a)(2) and 52-55(a)(3) should be amended to allow extension upon request of an applicant by adding the phrase "unless the beneficiary of the credit submits a written request for an extension to another date certain" to both new sections at the end of Line 92 and the end of Line 95.

## **BACKGROUND**

Expedited Bill 19-10 proposes several revisions to the Transportation Impact Tax Credit process in Section 52-57 of the County Code.

The bill, included in Attachment A, was introduced on April 20 with a public hearing on May 11. The County Council's MFP Committee worksession on this bill is scheduled for July 26. The Planning Department was involved in crafting the bill and is generally supportive of the results with minor modifications as described in this memorandum.

A broader question is how transportation impact taxes in general should be considered among the infrastructure financing tools. This broader consideration has been of interest to the Department during both of the last two Growth Policy cycles. Two initiatives will provide further opportunity to explore this topic during the next several months:

- The development of a White Flint Sector Plan financing mechanism presumes that a new taxing/development district mechanism will replace transportation impact taxes in the Sector Plan area.
- The Executive's April 19 report proposing a new Transportation Policy Area Review (TPAR) process proposes an overhaul of private sector contribution to master planned

transportation infrastructure that will require further examination of the relationship between policy area review, local area exactions, and transportation impact taxes.

The changes in Bill 19-10 are fairly narrow, but important:

- Several revisions to Sections 52-54, 52-55, and 52-57 would clarify definitions of improvements eligible for transportation impact tax refunds. In many cases, the proposed changes are additions that codify existing Executive Regulations.
- Section 52-59, a new section of the code, would codify our expectation that transportation mitigation payments made under Policy Area Mobility Review must be used for transportation improvements (similar to the law established regarding School Facility Payments).

The Transportation Impact Tax credit process exists to allow private development a credit against their transportation impact taxes for off-site infrastructure improvements they make for which transportation impact taxes are also collected. The clarification of eligible improvements is necessary to streamline the credit review process.

## REASONS FOR PROPOSED CHANGES

The “*Additional Capacity*” has been modified because the current definition in existing Executive Regulations and codified in Section 52-47 may have lasting utility beyond the anticipated revision to transportation impact taxes and therefore should be stated in a multimodal manner by amending Lines 4 through 13. Staff believes that it should include language that not only reflects vehicle capacity but also the multimodal nature of transportation accommodations. The term “*peak hour vehicle trip*” should be used consistently to clarify that:

- the units are vehicle trips, rather than person trips, and
- the time period is for the highest peak hour of traffic generation, rather than the full three-hour peak period.

The PAMR rate of \$11,300 *payment per peak hour vehicle trip*, and its annual escalation by the Planning Board, should be modified to make sure the language in this legislation is consistent with the language in the current Growth Policy.

The establishment of an *expiration date that can be extended upon request* is intended to address testimony submitted by Bill Kominers of Holland and Knight as part of the Council’s public hearing process; his comments are included as Attachment B. The intent of proposed new Sections 52-55(a)(2) and 52-55(a)(3) are to set an expiration date for credits that have already been established by MCDOT, but against which building permits have not been pulled. Such an expiration date would reduce County liability for approximately \$46M in impact tax credits, some of which will likely never be claimed due to a variety of reasons. In some cases, the County expects that credits are old enough that development corporations no longer exist to claim those credits. Because these “phantom” credits have no expiration date, the County must assume liability for them in perpetuity.



However, certain applicants do retain a vested interest in those credits. As noted in Attachment B, the Tower Company expected these credits to be available, regardless of when building permits would be pulled when the countywide impact tax was established in 2004; removing them at this time would be unfair. Staff therefore proposes that impact tax credits expire on the six-year schedule proposed in Bill 19-10 unless an applicant requests another date certain in the interim. This process allows the County to clean the books of phantom credits but protects the interests of stakeholders with active, long-term, development projects.